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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

FRIDAY, THE 19TH OCTOBER 2007 / 27TH ASWINA 1929

Crl.Rev.Pet.No. 2486 of 2007()

CRRP.82/2006 of ADDL.SESSIONS COURT, KOZHIKODE
MC.47/2006 of SUB DIVISIONAL MAGISTRATE, KOZHIKODE

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REVN. PETITIONER: RESPONDENTS/B-PARTY

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1. C.M.IBRAHIM, AGED 48 YEARS, S/O.HYDER, KEERAKKEDAN HOUSE, MADATHILPADAM, KARUVANTHIRUTHY P.O. FEROKE, KOZHIKODE DT.

2. T.ALIKOYA, AGED 44 YEARS, S/O.THODIYIL MUHAMMED, KUTHARATHODE, MADATHILPADAM, KARUVANTHIRUTHY, KOZHIKODE DT.

3. K.KOYALIKUTTY, AGED 45 YEARS, S/.USSANKUTTY MARAKKAR, KARICHIYIL HOUSE, MADATHILPADAM, KARUVANTHIRUTHY, KOZHIKODE DT.

4. P.MOHAMMEDALI, AGED 46 YEARS, S/O.PALAYIL MOHAMMED KOYA, PALAYIL HOUSE, MADATHILPADAM, KARUVANTHIRUTHY, KOZHIKODE DT.

5. KALLATH SAKKEER HUSSAIN, AGED 42 YEARS, S/O.UNNI, KALATH HOUSE, MADATHILPADAM, KARUVANTHIRUTHY, KOZHIKODE DT.

6. MULLAVEETTIL ABDUL GAFOOR, AGED 42 YEARS, S/O.A.P.ABOOBACKERKUTTY HAJI, MULLAVEETTIL, MADATHILPADAM, KARUVANTHIRUTHY, KOZHIKODE DT.

BY ADV. SRI.C.P.MOHAMMED NIAS

RESPONDENTS: REVISION PETITIONERS/A-PARTY
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1. KULANGARA VEETIL KOYA MOIDEEN KUTTY,
   ALIAS BAVA, AGED 54 YEARS, S/O.MAYINKUTTY HAJI,
   KULANGARA VEETIL, MADATHILPADAM,
   KARUVANTHIRUTHY P.O.FEROKE, KOZHIKODE DT.

2. VENMARATH AHAMMED KUTTY @ BAVA,
   S/O.BICHAVA HAJI, AGED 54 YEARS,
   VENMARATH, MADATHILPADAM, KARUVANTHIRUTHY,
   P.O.FEROKE, KOZHIKODE DT.

3. P.T.MUHAMMED @ BAPPU,
   S/O.IMBICHUTTY MARAKKAR, AGED 57 YEARS,
   MADATHILPADAM, KARUVANTHIRUTHY,
   P.O.FEROKE, KOZHIKODE DT.

4. A.P.ABOOBACKER, S/O.AHAMMED, AGED 59
   YEARS, KUNDATTIL HOUSE, MADATHILPADAM,
   KARUVANTHIRUTHY, P.O.FEROKE, KOZHIKODE DT.

5. V.K.BAVA, S/O.ABDULLAKOYA, AGED 55
   YEARS, KULANGARA HOUSE, FEROKE P.O.,
   KOZHIKODE DT.

BY ADV. SRI.P.N.RAVINDRAN
SMT.PREETHY KARUNAKARAN
SMT.MEENA.A.
SRI.SUNIL KUMAR A.G
SRI.JAYKAR.K.S.
PUBLIC PROSECUTOR
SRI.K.S.HARIHARAPUTHRAN
SRI.GEORGE MATHEW
SRI.K.B.SIVARAMAKRISHNAN

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 19/10/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

V. RAMKUMAR, J.

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Crl. R.P. No. 2486 of 2007

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Dated: 19-10-2007

O R D E R

In this revision filed under Sec. 397 read with Sec. 401 Cr.P.C. the petitioners who were "B - party" before the Sub Divisional Magistrate, Kozhikode challenge the revisional order dated 16-6-2007 passed by the I Addl. Sessions Judge, Kozhikode in Crl.R.P.No. 82 of 2006 holding that the "A - party" is entitled to administer the mosque in question and entitled to get possession of the key of the mosque in question from the "B - party" and directing the "B - party" to handover the key to the "A - party" through the Station House Officer, Feroke.

A - PARTY'S CONTENTION

2. Adv. Sri. Hariharaputhran, the learned counsel appearing for the contesting respondents ("A - party") made the following submissions before me in support of the revisional order passed by the Sessions Court:-

The proceedings before the Sub Divisional Magistrate were not initiated by the "A - party" even though "A - party" had filed complaints before the S.H.O., Feroke against the "B - party". Consequent on the

report of the S.H.O. Feroke, the mosque in question was closed on 10-3-2006. The closure was reported to the Village Officer, Karuvanthuruthi who in turn intimated the same to the Tahsildar, Kozhikode who in turn reported the breach of peace to the Sub Divisional Magistrate. A copy of the F.I.R. in Crime No. 60 of 2006 registered by Feroke Police was also forwarded to the Sub Divisional Magistrate, who initiated proceedings under Sec. 145 Cr.P.C. On 17-3-2006 the Village Officer, Karuvanthuruthy furnished a report before the Sub Divisional Magistrate to the effect that there was a scramble for possession with regard to the Karuvanthuruthy Mosque and its properties situated in 15.250 cents of property comprised in re-survey No. 19/11, that the K.N.M. Committee was in possession of the mosque pursuant to the split on 17-8-2002, that after the mosque was locked on 10-3-2006 somebody broke open the Mazjid. Two crimes were registered by the Feroke Police prior to 10-3-2006 as Crime Nos. 25 and 28 of 2006 against the A & B parties respectively. In the report filed on 17-3-2006 by the Village Officer Karuvanthuruthy, it was stated that civil suits were pending and that "the H.M. faction" ("B party") was administering the mosque. When the mosque was closed on 10-3-2006, how could the Village Officer report on 17-3-2006 that the "B party" was administering the mosque ? O.S. 568 of

2002 before the Munsiff 's Court, Kozhikode was a suit filed by "A - party" against the "B party" for a perpetual injunction restraining the defendants from entering the premises of K.N.M. and using its seal. On 25-10-2002, a temporary injunction was issued by the civil court after hearing both sides. As on 10-3-2006, when the mosque was closed the said order of injunction was in force. Even though the said order was earlier set aside in appeal, this Court in Ext.A8 order dated 18-11-2005 in C.R.P. 133 of 2003 had restored the interim injunction passed by the trial court. Annexure A7 and A8 produced in this revision are the counter affidavits in the interlocutory application in a Writ Petition filed by the "A party". They have accepted the pending litigation before a civil court and have admitted their allegiance with "the H.M. faction". When the civil court is in seizin of the matter the S.D.M. cannot proceed further. **(See Narayanan Embran v. State of Kerala - 1989 (2) KLT S.N.22).** The report of the Village Officer says that the "B party" claimed that the office of K.N.M. is at Markaz Sudhava, Ram Mohan road. But in Ext.P1 the "B party" had admitted that the office of K.N.M. is at Mujahid Centre, Annie Hall Road, Calicut. Ext.P21 shows that the "B - party" is running their office at Markaz Sudhava. Ext.A1 is the title deed dated 6-3-1998 by which A.P. group purchased 15 ¼ cents in R.S. 19/11.

It was purchased in the name of Abdul Khader Maulavi who was the General Secretary. It shows that the office of the organization is at Annie Hall road. Even though the Sub Divisional Magistrate had noticed the pendency of the civil litigation, instead of refraining from proceeding with the matter further, he continued the proceedings. When the only question germane for consideration in a proceeding under Sec. 145 Cr.P.C. is the question of possession, the Sub divisional Magistrate has gone to the extent of deciding the validity of the elections allegedly conducted in the years 2003 and 2006 as contended by the "A - party". When the civil court had already passed an interim order, the S.D.M. should have taken off his hands from the present controversy. After the mosque was closed on 10-3-2006 the S.D.M. was initiating suo moto action pursuant to the report of the S.H.O. Feroke. The scope of proceedings under Section 147 Cr.P.C. is only to preserve public peace and not for settling private disputes between two contestants **(P.C. Ashraf v. V.P. Abdulla - 1987 (1) KLT 795).** It is open to the Magistrate, if necessary, to consider the evidence of title so as to enable him to decide the factum possession and the Magistrate can also presume that possession follows title. **(Vide A. Narayanan Kutty Menon and Others v. Elayat Sekhara Menon and Another - AIR 1964 Kerala 308)**. Ext.A1 is the title

deed in the name of K.N.M. of the year 1998. This was prior to the split on 17-8-2002. Ext.A4 is the basic tax receipt dated 8-2-2006 evidencing payment of tax by Abdul Khader Maulavi on behalf of K.N.M. In Ext.A5 certificate dated 8-2-2006 the Village Officer has certified that the General Secretary of the K.N.M. Committee is in possession of 15 ¼ cents of land comprised in R.S. 19/11. Ext.A9 is the receipt dated 22-3-2006 issued by the K.S.E.B. to Abdul Khader Maulavi regarding payment of electricity charges. Ext.A10 which is the same as Ext.B2 is the report of the election dated 28-2-2003 conducted in the unit at Mujahid Centre, Calicut in the year 2003 approving the election. Similarly, Ext.A11 is the election report dated 3-2-2006 held in the year 2006 and the same has also been approved. Ext.A12 is a letter dated 1-5-2003 from the General Secretary, K.N.M. to V.K. Bava of "A - party" authorising him to interfere in the matter and solve the matter amicably. Ext.A13 is the order dated 14-2-2005 issued by the R.D.O. Calicut granting permission to convert the land under the Land Utilisation Order on the application by the "A - party". It shows that the "B - party's" impleading application was dismissed. Ext.A14 is the list of the governing body of K.N.M. submitted by the State Committee after the 2006 election. It was submitted to the District Registrar. Sl.No. 7

therein is A.P. Abdulkhader Maulavi. Ext.A15 is a complaint preferred by the "A - party" before the Feroke Police Station on 12-02-2006 seeking police protection. Ext.A16 is a petition dated 16-3-2006 by the "A - party" before the R.D.O. alleging that on 11-3-2006 the "B party" had broke open the mosque and had taken away certain documents therefrom. Ext.A19 is the F.I.R. relating to the incident that took place on 2-2-2006. The date of the Sub Divisional Magistrate's order is 16-10-2006. But Ext.A20 order sheet shows that there was no posting of the case on 16-10-2006. Apprehending that the Sub Divisional Magistrate would pass orders in favour of the "B party" the "A - party" had filed a Writ Petition before this Court and had obtained an order from this Court not to handover the key of the mosque to the "B - party" and this Court granted time till 1-10-2006 to the Sub Divisional Magistrate to pass final orders. On 16-10-2006 itself the Sub Divisional Magistrate passed the final order and on 20-10-2006 handed over the key to the "B party". The very fact that on 12-10-2006 "A - party" had filed a copy application of the order, if any, passed will show that the "B party" were expecting a favourable order in their favour. Ext.A 26 is the judgment regarding the mosque in another unit. This Judgment shows that the "A - party" is administering that mosque pursuant to the election held in 2003 and

2006. Ext.A 29 is the newspaper report showing that the members of the "B - party" had asserted that they would grab the mosque. Ext. A30 shows that the property lying contiguous and comprised in R.S. 19/5 was purchased by the K.N.M. through its Secretary K.A. Moideen who was elected in the year 1999. It also shows that prior to the split the application for construction of building plan was given by K.A. Moideen the Secretary. Ext.A31 is an objection dated 30-3-2001 to the effect that the building plan should not be renewed in the name of K.A. Moideen who is not the present Secretary. The mosque was not constructed by obtaining contribution from the public as contended by the "B party". Ext. A33 series will show that the treasurer Abdul Salam was a "B - party" man and he received funds from the General Secretary of K.N.M. Absolutely no document has been produced to show that "the H.M. faction" ever administered K.N.M. Since there is no Madrassa functioning attached to the mosque, the documents produced by "B party" regarding a Madrassa do not belong to this mosque. All the documents produced by the "B party" are pertaining to Ext.B1 property admeasuring 6.5 cents in R.S. 19/5 which is not part of the mosque property. As long as the "B party" has not challenged the elections conducted in the years 2003 and 2006 as evidenced by Exts.A10 and A11 they cannot question the

administration of the mosque by the "A - party" The argument of the "B - party" that P.T. Mohammed @ Bappu who is not a treasurer after the 2003 election would claim to be the treasurer in Annexure A1 statement given by him to the police on 13-3-2006 and this would show that no election took place in the year 2003, is fallacious. Ext.A1 is pertaining to an incident which took pace on 2-2-2006 whereas the election was held on 3-2-2006. In other words, until 3-2-2006 P.T. Mohammed @ Bappu was the treasurer. Of course he was elected as Secretary on 3-2-2006 and he should have described himself as the Secretary instead of the treasurer in Ext.A1 statement given on 13-3-2006. But that may be a mistake. Likewise, merely because Ext.A3 shows that V.K. Bava was in the hospital on 3-2-2006, it does not mean that no election was conducted on that day. The bye-laws do not insist on the physical presence of the candidates for the election. Exts. A5 and A6 list of committee members will show that the primary membership of those members must have been renewed without which they could not have conducted the election. As per the bye-laws both men and women can be members. It was after a re-appraisal of the entire materials produced by either side, that the Sessions Judge came to the conclusion that the "A - party" was in possession of the mosque and that was why the "B - party" was directed to handover

the key to "A - party". The said order does not suffer from any illegality so as to warrant interference by this court .

B - PARTY'S CONTENTION

3. The stand taken by the "B - party" as argued by their counsel Adv. Sri. Mohammed Nias, is as follows:-

On 10-3-2006 the H.M. faction (B party) complained to the S.H.O. , Feroke Police Station alleging disruption of the Juma prayers by ""the A.P. faction"" (A party). The S.H.O. locked the mosque on 10-3-2006 itself. On 13-3-2006 the B party moved the Sub Divisional Magistrate alleging obstruction from "A - party". On 16-3-2006 the Sub Divisional Magistrate assumed possession of the mosque from "the H.M. faction" (B party) after initiating proceedings under Sec. 145 Cr.P.C. The C.I. , Nallalam and village Officer Karuvanthuruthy were directed by the Sub Divisional Magistrate to send reports. the B party filed W.P.C. 8868 of 2006 before this Court. On 7-4-2006, this Court directed the Sub Divisional Magistrate to decide the question of possession on or before 31-5-2006. The above time limit was extended from time to time by this court. On 16-10-2006 the S.D.M. passed the final order holding that "the H.M. faction" (B-party) was in possession of the mosque and directed the key to be handed over to "the H.M. faction". The key was accordingly handed over to

the B party from whom possession was earlier taken by the S.H.O., Feroke. On 18-10-2006 A.P. faction (A party) filed W.P.C. 27491 of 2006 before this court alleging bias on the part of the S.D.M. and apprehending an order in favour of "B -party" as if the proceedings were still pending before the S.D.M. On 19-10-2006 A party obtained a stay of the entire proceedings including the pronouncement of the final orders by the S.D.M. On 20-10-2006, in deference to the order passed by this Court, the S.D.M. took the key back from "the B - Party" . On 13-11-2006 W.P.C. 27491 of 2006 was disposed of giving A.P. faction (A party) time till 29-11-2006 to file a revision before the Sessions court , Kozhikode against the order passed by the Sub Divisional Magistrate on 16-1-2006 and directed that until then the order of the S.D.M. should not be implemented. Eventhough the A party alleged that the S.D.M. was a relative of Moideen, the Secretary of the K.N.M. and was siding the "B -party" by ante-dating the final order, there was absolutely no basis for the said allegation. On 23-11-2006 the A party filed Crl.R.P. No. 82 of 2006 before the Sessions Court, Kozhikode. The Addl. Sessions Court as per the impugned order dated 16-6-2007 reversed the order dated 16-10-2006 passed by the S.D.M. by relying on irrelevant material.

JUDICIAL EVALUATION

4. I am afraid that I cannot agree with the submissions made on behalf of the "A - party". The proceedings before the Sub Divisional Magistrate under Sec. 145 Cr.P.C. were with regard to the rival claims of possession in respect of a mosque situated in 15 ¼ cents of property comprised in Re-survey No. 19/11 of Karuvanthuruthy Village purchased in the name of a Charitable Society by name Kerala Naduvathul Mujahidheen (KNM for short) in the year 1988 by its General Secretary. The mosque was constructed with public funds in the year 1999. In the same year KNM was registered as a Charitable Society under the Societies Registration Act, 1860. The administration of the mosque and its properties is carried on as per a registered bye-law. The bye-law envisages a five tier structure consisting of the Local Committee, a Mandalam Committee, a District council, a State Committee (ആലോചനാസഭ) and a Managing Committee. The term of the Executive committee is three years. The first Executive Committee consisting of 15 members came into power on 24-9-1999 as a result of election conducted in that year. One K.A. Moideen was elected as the Secretary. On 17-8-2002, there arose a split in the organization giving rise to two rival factions , one faction was headed by A.P. Abdul Khader Maulavi and can be called "the A.P.

faction". The other faction headed by Hussain Madavur can be called "the H.M. faction". The revision petitioners belong to "the H.M. faction" and they were "B party" before the Executive Magistrate. Respondents 1 to 6 are members of "the A.P. faction" and they represented "A - party" before the Sub Divisional Magistrate.

5. After hearing both sides and perusing the records , I find myself unable to endorse the conclusions reached by the Addl. Sessions Court for the reasons to be mentioned hereinafter. There is no dispute that the split in the K.N.M arose on 17-8-2002 giving rise to the two factions. Much reliance has been placed by the revisional court below on the election allegedly conducted in the years 2003 and 2006 as contended by the A party. When the so called election itself is disputed by the "B - party", according to whom the A party was passing a resolution expelling the B party from the K.N.M. and creating records to make it appear that both in the years 2003 and 2006 there had been elections, the said election cannot be the basis whatsoever to come to a conclusion as to which of the two warring factions was in possession of the mosque and its properties as on 10-3-2006 when the mosque was admittedly locked up by the S.H.O. Feroke. The learned Addl. Sessions Judge appears to have been carried away by the existence of a civil case filed as O.S. 568 of 2002 before the

Munsiff's Court, Kozhikode. The interim injunction passed in the said suit and the appellate order passed by the District Court, Kozhikode in C.M.A. 245 of 2002 are all in respect of the property situated at Annie Hall Road, Kozhikode and not in respect of the Karuvanthuruthy property which is the subject matter of the present proceedings. Equally erroneous is the reliance placed on Ext.A13 proceedings under the Kerala Land Utilisation Order where the R.D.O. was moved for conversion of land. The initial order in those proceedings was passed much before 17-8-2002 which is the date on which the two factions came into being. Apart from wrongly giving credence to the elections set up by the A party the revisional court below even went to the extent of validating those elections. There is documentary evidence adduced by the "B - party" to show that the list of the elected members as submitted by the "A - party" is demonstrably wrong. I am not going into the details of those items of evidence in view of the proposed disposal of this revision. Similarly, there is documentary evidence adduced to show demand from and payment of electricity charges and other dues by "the H.M. faction" (B party) long after the split.

6. What is germane for consideration in a proceeding under Sec. 145 Cr.P.C. is the factum of actual possession of the subject

matter of dispute as on the date on which the Sub Divisional Magistrate receives a report from a police officer or any other information to the effect that a dispute likely to cause breach of peace exists. If it appears from such report or information that any of the parties has been dispossessed within a period of two months prior to such report or information the Sub divisional Magistrate is given the power to treat that such party was in possession of the property and to order accordingly. Sub section 4 of Sec. 145 Cr.P.C. indicates that the merits or the claims of any of the parties to a right to possess the subject matter of dispute is not relevant. In other words, even a person who has no right to be in possession of the subject matter of dispute or who does not have any prima facie title or ownership over the property may be in reality found to be in actual possession of the property. It is the possession of such a person which is to be preserved and protected and not the claim of a contesting party that he has better title, right, ownership or interest so as to be in possession of the property. The right of such a competing claimant will have to be agitated before the competent civil court and until then it is the order passed by the Executive Magistrate preserving and protecting the right of the person in actual possession which will have to hold the filed. If a person who has a better title or right to be in

possession of the property but who is actually not in possession is allowed to steal a march over the person who is actually in possession, then the custodians of law will be allowing the mighty to take the law into his or their hands. A proceeding under Section 145 Cr.P.C. is not for the purpose of evicting any person from any land but is primarily concerned with the prevention of the breach of peace by declaring the person found to be in possession to be entitled to remain in possession until evicted therefrom in due course of law. A decision on title or right to possession of the property in dispute, is not germane for consideration in a proceeding under Sec. 145 Cr.P.c. The principle underlying Sec. 145 is that whether a person has the best or worst claim, he should not take the law into his own hands and disturb public peace which is most essential for normal life in an orderly society. The result of an order under Sec. 145 may be to deprive the rightful owner of his possession temporarily and to subject him to other inconveniences. But such considerations are necessarily subordinate to the imperative necessity of preserving the public peace. The above provision cannot be allowed to be abused by persons for settling their private disputes. The satisfaction under sub-section (1) of Sec. 145 Cr.P.C. is that of the Executive Magistrate. The question whether on the materials before him, he should initiate proceedings or

not is, therefore, in the discretion which undoubtedly has to be exercised in accordance with the well recognised rules of law in that behalf. No hard and fast rule can, therefore, be laid down as to the sufficiency of the material for his satisfaction. Even an application by a party who has been dispossessed can constitute "other information" within the meaning of sub-section (1) of Sec. 145. The revisional court will not go into the question of sufficiency of the material which has satisfied the Executive Magistrate. Where the civil court is in seizin of the dispute involving the issue of possession of the property in question, initiation or continuance of parallel criminal proceedings under Sec. 145 Cr.P.C. would not be justified. **(Vide R.H. Bhutani v. Miss Mani J. Desai and Others - AIR 1968 S.C. 1444; Chandn Naik v. Sitaram B Naik - 1978 (1) SCC 210; Ram Sumer Puri v. State of U.P. - AIR 1985 S.C. 472; Abdul Azeez v. Pappu - 1986 KLT 288; Asraf v. Abdulla - 1987 (1) KLT 795 and Ranbir Singh v. Dalbir Singh - 2002 (3) SCC 700).**

7. When there is no civil dispute pending before the competent civil court with respect to the Karuvanthuruthy property, the learned Addl. Sessions Judge was falling into an error by placing reliance on the interim orders passed in O.S. 568 of 2002 which is admittedly in respect of the properties at Annie Hall road, Calicut. A

decision not based on legal evidence, raises a question of law **(See V. Ramachandra ayyar and another v. Ramalingam Chettiar and another - AIR 1963 SC 302). F**ailure to consider important evidence on record, amounts to an error of law giving rise to a question of law **(See Smt. Sonawati and others v. Sri Ram and another - AIR 1968 SC 466).** Failure to appreciate and determine a question of fact to be tried is an error of law **(AIR Sheikh Bahmat Ilahi v. Mohammed Hayat Khan and others - 1943 P.C. 208 and M/s. Orient Distributors v. Bank of India Ltd. and others - AIR 1979 S.C. 867)**.Where relevant evidence has not been considered but instead irrelevant materials have been taken into consideration, the resultant order cannot be said to be one passed in accordance with law. When the Executive Magistrate did have materials before him to arrive at the requisite satisfaction of initiating proceedings under Sec. 145 Cr.P.C., the revisional court would not go into the question of sufficiency of material. (See **AIR 198 SC 1444** - supra) The learned Addl. Sessions Judge has not decided the revision in the proper perspective. The decision dated 16-6-2007 passed by the learned Addl. Sessions Judge, cannot, therefore, be supported and is accordingly set aside. Crl.R.P. 82 of 2006 will stand remitted to the Sessions Court, Kozhikode. The Principal Sessions Judge shall dispose

of the said revision in accordance with law after giving both sides an opportunity of being heard. The said disposal shall be untramelled by any observations, if any, made in this order on the merits of the case.

The parties shall appear before the Sessions Court without any further notice on **28-11-2007.**

V. Ramkumar, Judge.

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